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No. 96-1957

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1996

PAUL JENNINGS HILL,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

CAPITAL CASE

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

Counsel of Record for Petitioner:

ROGER J. FRECHETTE, ESQ.
FRECHETTE & FRECHETTE, ESQS.
12 Trumbull Street
New Haven, CT 06511
(203) 865-2133

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STATEMENT IN REPLY

I. THE FARETTA ISSUE

Florida's brief in opposition to Hill's petition for a writ of certiorari raises five issues, four of which seek to overcome Hill's assertion that the violations of Faretta v. California, 422 U.S. 806 (1975), require that Hill's petition be granted. Faretta sets forth the standard for waiving counsel as "an intelligent and knowing" waiver, 809; one must "competently and intelligently waive" 814; the waiver cannot be a "mechanical exercise" 815-816; and, as applied to Florida rule §3.111(D), prohibits a waiver "unless a thorough inquiry be made into both the accused's comprehension and understanding", and "no waiver shall be accepted if it appears that the defendant is unable to make an intelligent and understanding choice because of the... nature and complexity of the case". The Faretta standard has been breached.

Hill printed the entire Faretta transcript in his appendix, A34-A200i, A207-A225, and A278-A298, yet in its opposition, Florida only quotes a dialogue between the state's attorney and Hill, which does not satisfy Faretta. As the State's Attorney announced he would be seeking the death penalty for Hill, it

is not reasonable to expect Hill to believe his adversary when that same state's attorney illegally told the jury that the jury only applied the facts to the law and the jury did not impose the death sentence when the state's attorney said, (TR 65):

> ..it is the judge's decision to impose the decision of guilt or the decision of punishment. That is the judge's decision. It is not the jury's decision [Emphasis added].

When Florida quotes only the state's attorney and not the trial judge, it judicially admits that the Faretta inquiry by the judge was inadequate, as the record is devoid of a valid Faretta compliance by the trial judge.

Certain court inquiries illustrate the Faretta deficiencies, as shown in the Appendix, A61-A73 and A125-126. Hill acknowledges that the public defenders were competent, but he declined to use them because of the justification defense issue. In response to the Court's questions, A64-65, Hill does not respond in any degree of specificity to satisfy Faretta because his response in essence is that he wants to act in a manner that is pleasing to God. A66 through A73 illustrates, in detail, that there is no valid waiver.

In particular, A73, in response to the court's question "Do you think you understand the legal process and the legal system?" Hill responded: "No, sir, I don't make any pretense of understanding American Jurisprudence."

Again, in response to the prosecutor's questions as to whether or not he would like to have another lawyer, other than

the public defenders, Hill's answer was: "It's entirely possible." (A125-126).

That indicates that Hill did not want to, indeed could not, proceed Pro Se, and he needed a lawyer who would present the justification defense. Again, A196-A197, when the trial court prohibited Attorney Heuser from taking part in the argument to preclude the justification defense, in response to the Court's inquiry as to whether Hill would like to address the Court, Hill stated: "No, sir. Since you disallowed the attorney to speak for me, I'll just let my brief speak for itself."

Again, there is no waiver of counsel to satisfy Faretta and, tragically, before the penalty phase of the proceedings, Record 661-672, Hill again articulates, in regard to the problem he had with the public defenders, Record 662-2:

> However, they just philosophically and theologically just don't agree with me. And I would like to have some standby counsel that does agree with me so that --I realize the phase we are about to enter into is a very important phase..if it's possible, I would ask this Court to at least consider the credentials of these men whom I'm suggesting without any burden on the Court could come and serve as my standby counsel, Mr. Vincent Heuser and Mr. Michael Hirsh.

It's clear through the entire transcript that Hill did not make a valid Faretta waiver. As shown by Hill's Appendix at page 292, handing Hill a scoresheet at the commencement of the penalty phase manifests the injustice. Lastly, Record 672, L12-15, Hill articulates why the

case went the way it did:

> Well, Your Honor, it's my desire given my opinion of this Court, it's my desire to participate in as little as possible in these proceedings. So I wouldn't be culpable in them.

Obviously, what Hill wanted to do, he was not permitted to do. He wanted Attorney Heuser to represent him as proven, A179-183, when Hill requested that Attorney Heuser, who authored the brief in support of the justification defense, be permitted to represent him; the state objected; and the trial court sustained the objection on the grounds that Attorney Heuser was from out of state. A181-183. So too, Attorney Heuser's motion to represent Hill, Pro Hac Vice, A226-228, was objected to by the state, and the motion was denied by the court. A183. Respectfully, these exchanges prove Hill could not proceed Pro Se, and therefore his "waiver" not only did not satisfy Faretta, but Hill stated on the record that he wanted a lawyer.

The Florida Supreme Court admitted that Hill should not have been permitted to conduct the trial Pro Se. It ordered Judge Elzie Sanders to conduct a Faretta hearing to ascertain if Hill had the ability to process the appeal Pro Se, and Judge Sanders approved, which the trial court did not, out of state counsel, when Judge Sanders stated, in response to the out of state issue, A303:

> You know, the location is not important, but do you routinely--or you have access to other attorneys that could counsel with you and advise

you or address certain questions that you have in reference to the appellate process? [Emphasis added]

The Florida Supreme Court acknowledged that Hill required an attorney when it ruled, A301-302:

> Counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellant advocacy addressed to both the judgment and the sentence.
>
> Accordingly, counsel for the appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of the appellant's interest. The foregoing rulings are made without prejudice to the right of the appellant to request leave to follow a Pro Se supplemental brief setting forth his personal positions and interest in regard to the subject matter of this appeal... Thus we deny Hill's motion [to appeal Pro Se]. Because this is a capital case, we will permit Hill to file a Pro Se supplemental brief on or before the time within which his attorney's brief shall be filed.
> It is so ordered.

That comment by the Florida Supreme Court admits that Faretta was violated. Respectfully, if Hill needed a lawyer on the appeal, he most certainly needed a lawyer, and Faretta required a lawyer during the trial of the case.

That is further proven by Florida's brief, page 9, in quoting the Florida Supreme Court's decision, Hill, 688 So. 2d at 904 n.1:

> As to the nature and complexity of the case, there is nothing particularly complex about the defense of justification or necessity that would lead us to conclude that Hill was unable to make a fully intelligent understanding choice to waive counsel under Rule 3.111(D).

No one seriously can dispute the complexity of the necessity defense. At page 12 of Florida's brief, it comments on Hill's six-page footnote at pages 19 through 25 of Hill's petition, where the predicate steps to establish the justification defense are set forth. Significantly, Florida does not even dispute the fact that the use of compulsory process by a knowledgeable, experienced criminal lawyer is required to set up that factual predicate necessary for the complex justification defense. How could Hill possibly have accomplished that from a prison cell?

Respectfully, U.S. v Harrison, 451 F. 2d, 1013 (1971), which reversed a conviction when a lawyer was permitted to proceed Pro Se, the court held that the lawyer did not adequately waive representation by counsel. If a lawyer cannot defend himself, certainly Hill cannot defend himself, and Hill, unlike Harrison, is a justification defense case, and Hill was incarcerated.

The dates of the developments of the proceedings in the trial court are

essential to understand the Faretta violation (Appendix references are to Hill's appendix dated June 6, 1997):

09/26/94 Public defender's motion to withdraw and Faretta filing (A25-34)

09/27/94 Transcript of hearing (A34-153)

09/30/94 Court grants both motions (A28-33)

10/13/94 Supplemental Faretta hearing (A153-178C)

10/14/94 Florida's motion to preclude justification defense (A201-206)

10/24/94 Atty. Heuser's motion to appear Pro Hac Vice (A226-228); Hill's motion that Atty. Heuser to represent him (A179-183); Denial of aforesaid motion by court (A183); Florida files brief in open court in support of motion to preclude and hands same to Hill (A185); Florida's in limine brief (A204-225); Court grants Florida's motion to preclude (A199-200);Court's written memorandum granting said motion (A229-230).

On September 26, 1994, the public defender moved to withdraw and filed the Faretta motion. Twenty-nine days later, on October 24, 1994, the motion prohibiting the justification defense was granted by the Court. Therefore, Hill's trial effectively resulted in an extended plea of nolo contendere because he was precluded from setting forth the justification defense--his only defense. As aforesaid, in a five day period from September 26 through September 30, 1994

the public defender was permitted to withdraw and the Faretta motion was granted; on October 14, 1994, Florida filed a motion to preclude the justification defense, but it was not until Hill was in open court on October 24, 1994 that Florida handed Hill the brief in support of its motion to preclude the justification defense. Hill did not even have time to read the brief. Hill's motion to have Attorney Heuser represent him and Attorney Heuser's motion to appear Pro Hac Vice, were both filed, opposed by Florida, and the court denied them all on October 24, 1994.

It is respectfully submitted that even a lawyer as able as Attorney Heuser, if he were standing in open court when a brief was handed to him concerning the motion to be heard, would have requested a continuance to at least read and research the citations. Can anyone seriously assert that Hill, who was incarcerated, who is not a lawyer, who did not understand the factual predicate to present the justification defense, who stated he did not understand the American Jurisprudential System was afforded due process in the handling of the motion to preclude the justification defense? Respectfully, he was not.

II. THE DISMISSAL ISSUE

On pages 13 and 14 of its Brief In Opposition, Florida asks this court to deny the writ on the grounds that Hill has not authorized the petition; Hill has not; but Hill pled not guilty, and he has never sought to change his plea to that of guilty. He has always maintained that he is not guilty of the crimes charged. It must be remembered, despite his not

guilty plea, Hill asked no voir dire questions, objected to no state voir dire questions, waived his opening statement in both the guilt and penalty phases, failed to cross-examine any witnesses, failed to offer any exhibits, failed to object to any exhibits, offered no witnesses, failed to object to any questions by the state, failed to move for a mistrial; filed no request to charge, took no exceptions to the charge, and, despite these Faretta shortcomings, Florida has asked that the writ be dismissed. But Hill has been illegally convicted because, despite pleading not guilty, he was denied due process when he was permitted to proceed Pro Se in violation of Faretta. The undersigned was appointed Hill's lawyer, Pro Hac Vice, by the Florida Supreme Court. For the undersigned to not raise the issues which the undersigned has raised in the petition, would place the undersigned in the position of being an accomplice to the death of a person who is not guilty of the crimes charged, and in any event has not received due process.

This is not the case, as was Lenhard v. Wolff, 444 U.S. 807 (1979) cited by the Respondent, of a defendant having pled guilty, then the defendant asking that his execution not be stayed. In Lenhard, the defendant requested that his execution not be stayed; the state, as it did in the instant case, did not make that request. Hill, on the contrary, pled not guilty and pursued his appeal in the Florida Supreme Court. For the undersigned now to abandon what he perceives as the illegal taking of a life by the state, places the undersigned in, as Justice Marshall, so elegantly set forth in Lenhard, 812, a position where

he would be aiding and abetting the state in committing either suicide or murder. For the undersigned to not raise the issues which the undersigned has raised in the petition, would place the undersigned in the position of being an accomplice to the death of a person who the undersigned believes is not guilty of the crime charged. Hill himself believes he is not guilty of the crimes charged, and, in any event, Hill has not received due process in violation of the Sixth and Fourteenth Amendments. Both Lenhard and Hammett v. Texas, 448 U.S. 725 (1980), cited by the state are inapposite as neither case involved the state seeking to have the petitions dismissed. This is not a Rule 46 issue.

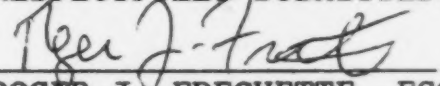
Respectfully, Florida should join in with the petitioner and ask that certiorari be granted, so that the search for the truth might prevail, particularly in this capital case.

CONCLUSION

WHEREFORE, for all the foregoing reasons as set forth herein and those in Hill's Petition for Writ of Certiorari, the Petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari to the Supreme Court of the State of Florida.

Dated: August 21, 1997

RESPECTFULLY SUBMITTED,

BY 

ROGER J. FRECHETTE, ESQ.
12 TRUMBULL STREET
NEW HAVEN, CT 06511
(203) 865-2133